

HOOKS/SUPERX INC.  
d/b/a CVS PHARMACY, #6624

DL38-20719

802 North Meridian Street  
Portland, Indiana 47371

DISTRICT 2

## **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I.**

#### **BACKGROUND OF THE CASE**

The permittee, Hooks-SupeRx, Inc., d/b/a CVS Pharmacy, #6624, 802 North Meridian Street, Portland, Indiana 47371, ("prospective permittee" or "permittee") is the applicant for an Indiana Alcohol & Tobacco Commission ("ATC") type 208 permit, #DL38-20719.<sup>1</sup> On or about October 9, 2003, the prospective permittee filed the Application and the matter was assigned to the Jay County Local Alcoholic Beverage Board ("LB") for its investigation and consideration. The Application was opposed by the Remonstrators. The LB held a hearing on the application on November 25, 2003 and voted 3-1 to recommend denial of the Application.<sup>2</sup> On December 2, 2003, the ATC voted to adopt the recommendation of the LB and denied the permit at issue.

Permittee filed a timely notice of appeal and the matter was assigned to ATC Hearing Judge Mark C. Webb ("HJ"). The matter was set for hearing on April 22, 2004, and at that time, witnesses were sworn, evidence was heard and the HJ took the matter under advisement. The prospective permittee was represented by counsel, Jeffrey L. McKean, Wooden & McLaughlin, LLP, Indianapolis. The Remonstrators were not represented by counsel.<sup>3</sup> The HJ took

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<sup>1</sup> Liquor, beer and wine dealer (drug store) located in an incorporated area.

<sup>2</sup> LB members Jay King, Richard Whitesell and Patricia Fleck, the ATC designated member of the LB (*see*, IC 7.1-2-4-6) voted against the issuance of the permit citing no need or desire for the services at that location. *See*, 905 IAC 1-27-4. LB member Maxine Lewis voted to issue the permit.

<sup>3</sup> Remonstrator Ruth Hosier, manager of the only two package liquor stores located in Portland, appeared at the ATC hearing seeking standing. Up to that point, pursuant to *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. App. 1990), *trans. denied*, it has been the Commission's position that competitors have no standing before this Commission. However, at the request of the package liquor store industry, Ms. Hosier, although denied standing at the April 22, 2004 hearing, was permitted to testify at the close of the proceedings and it was this HJ's intent to append her testimony to the record for purposes of possible challenge to *Wine and Spirits*. In the meantime, the Indiana Court of Appeals decided *Indiana Association of Beverage Retailers, et.al., v. Indiana Alcohol & Tobacco Commission, et.al.*, No. 49A02-0307-CV-634 (May 25, 2004), stating that a competing permittee has standing before the Commission to contest the awarding of a permit to a competitor. The Commission has determined that there is a legal conflict between *Wine and Spirits* and *IABR*, and the *IABR* case is pending before the Indiana Supreme Court on a petition for transfer. The Commission thus awaits a ruling from the Supreme Court as to whether competitors have standing in this situation. In the meantime, until

administrative and judicial notice of the entire file in this matter as well as other records of the Commission and now submits his proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

## II.

### EVIDENCE PRESENTED BEFORE THE LB

- A. The following individuals testified before the LB in favor of the permit being issued in this cause:
1. Jeffrey N. Scott, district manager of the CVS Jay County. CVS operates approximately 300 stores throughout Indiana, the majority of which have permits to sell alcohol. He oversees 21 CVS stores, 18 of which sell alcohol. Mr. Scott stated that if CVS were granted a permit, that the alcohol product would be in an area near the grocery and cooler section, but a person who wishes to purchase alcohol would have to do so at the front counter as there is no way to exit the store without going past the front checkout counter. The liquor bottles themselves are stocked with protective caps which must be removed by the cashier at the time of sale.<sup>4</sup> CVS also has a software system in place with respect to alcohol sales which prompts the cashier to request and enter the purchaser's date of birth before a sale can be completed.<sup>5</sup> He said that in his experience with CVS to-date, that most store customers liked the fact that CVS sold alcohol and appreciated the convenience of being able to buy drug items as well as alcohol products at the same location and in the same transaction. He stated that 4-5 customers per week come in and ask if they carry alcohol and when told no, ask when they will begin doing so. He noted that Jay County has openings for four (4) pharmacy permits but none of them have been issued.
- B. The following exhibits were introduced before the LB in support of the permit application in this cause: None.
- C. The following individuals testified before the LB in opposition to the permit being granted in this matter:
1. Agnes Howell. She and her husband have raised a family on a Jay County farm. She also has teenaged grandsons who live in the county. She appreciates CVS and shops there but wishes CVS would remain family friendly and not sell alcohol. She stated that

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the matter is ultimately settled, the Commission will allow such testimony into the record and the issue of a competitive remonstrance will go to the weight as opposed to admissibility. *See*, fn. 9, *supra*.

<sup>4</sup> These are plastic reusable devices which CVS puts on the top of all bottled product before it is placed on the shelf for retail sale. It can only be removed by the cashier using a special tool. If a bottle is removed from the store other than through a retail transaction, the only way to remove the protective cap is to break the bottle, thus rendering the product unusable.

<sup>5</sup> This HJ understands this system as requiring the cashier to obtain the date of birth from every purchaser and actually enter that information, irrespective of the purchaser's actual age, in order for the sale to be completed.

there are already two liquor stores in Portland where alcohol can be purchased and there is no need for an additional outlet.<sup>6</sup>

2. Kenley Barcus. He and his family patronize CVS. He is concerned about alcohol arrests in the county and that there is no need for an additional outlet in this town.
3. Ned Stuckey. He also shops at the Portland CVS. He is a former guidance counselor East Jay Junior High School and is concerned that many items are purchased in a drug store with very little thought beforehand. He is concerned that if that spontaneity is transferred to the purchase of alcohol that it could be very dangerous for those people who purchase their medicine there.<sup>7</sup> He felt that alcohol and medicine should not be purchased from the same location.
4. Dorsey Boise. His physician is located in Portland and he purchases his medicine from CVS. He does not favor an alcohol license at that location.
5. Paul Strouse, Senior Minister, West Walnut Street Church of Christ, Portland. He appreciates CVS in Portland and noted that Portland has lost one of its drug stores. He does not feel that the sale of alcohol is compatible with the desire to operate a family oriented and healthy atmosphere. He also stated that with three outlets within walking distance, there was no need for a fourth.<sup>8</sup> He is worried that with CVS's buying power, it could put other outlets out of business. He indicated that the community needs CVS very much but does not need the sale of alcohol there.
6. Ruth Hosier, manager of North Side and South Side Carry-Out, Portland.<sup>9</sup> She objects to CVS selling alcohol because there are enough outlets in Portland. She also testified that because only persons over 21 can enter a package liquor store, that her setting provides a greater protection against minors being able to obtain alcohol.
7. Juan Loredó. Minister with the local Church of the Nazarene. He has a 15 year old daughter who attends Jay County High School. He moved from Southern California to Portland to get away from the drug and alcohol infestation of that region. He noted that 2 Jay County young people had recently died in traffic accidents that were alcohol-related. He patronizes CVS but states that there is no need for additional alcohol sales in Portland.

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<sup>6</sup> This HJ would note from the outset that both package liquor stores in Portland are owned by the same individuals. Therefore there is no competition with respect to carry-out liquor in Scott County.

<sup>7</sup> Mr. Stuckey presented no evidence in support of this "spontaneity" claim and this HJ finds no relevance to it.

<sup>8</sup> This HJ assumes one of these outlets to be a restaurant/bar permit, given that the only carry-out stores are the two package stores owned by the same individual.

<sup>9</sup> Ms. Hosier, as the manager of a package liquor store, is a would-be competitor of CVS and, according to *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. App. 1990), *trans. denied*, has no standing before this Commission. *But see, also, Indiana Association of Beverage Retailers, et.al., v. Indiana Alcohol & Tobacco Commission, et.al.*, No. 49A02-0307-CV-634 (May 25, 2004), stating that a competing permittee has standing before the Commission to contest the awarding of a permit to a competitor. The issue of standing notwithstanding, she clearly has a bias in favor of minimizing competition to the package liquor store industry. *See, Standifer v. State*, (1999), Ind., 718 N.E.2d 1107, 1110 "A witness's bias, prejudice or ulterior motives are always relevant in that they may discredit him or affect the weight of [the] testimony" (quoting *Pfefferkorn v. State*, (1980), Ind.App., 413 N.E.2d 1088, 1089. Thus her testimony would not be considered compelling given that her stores are the only game in town. Competition between permittees is not a valid reason for denying a permit.

8. Fred Grenier. He indicated that a group of persons who would be adversely impacted by allowing CVS to sell alcohol was teenagers and none of them happened to be there that day. He recalled being in Indianapolis during the General Assembly and hearing teenagers testify against allowing sales of alcohol at convenience stores. He felt that most teens would not want additional alcohol outlets in Jay County and that there is enough now.

### III.

#### EVIDENCE PRESENTED BEFORE THE ATC

A. The following witnesses testified before the ATC in support of the proposed permit in this cause:

1. Timothy Matty, manager of the CVS Portland. He has been employed by CVS for approximately the last 18 years, manager for 10. Before that, he had approximately 20 years of experience managing discount retail outlets. He has also had other experience in stores which sold alcohol and has supervised those types of sales. All CVS stores carry the same products which is important to customers, including those who purchase alcohol. CVS operates 250 stores throughout Indiana, of which approximately 90% have permits to sell alcohol.<sup>10</sup> The CVS stores he managed prior to the Scottsburg store which legally sold alcoholic beverages never had any problems or violations regarding the sales of those items. In 2001, CVS received a 100% compliance rating with respect to statewide identification checks for sales of alcohol and tobacco.<sup>11</sup> Mr. Matty stated that if CVS were granted a permit, that the alcohol product would be in a separate area of the store and would be constantly monitored by security camera with a TV screen that allows the cashier to actually monitor who goes into the alcohol product area. Any excess alcohol not on a shelf for sale would be kept under lock and key in the manager's office. The liquor bottles themselves are stocked with protective caps which must be removed by the cashier at the time of sale.<sup>12</sup> CVS also has a software system in place with respect to alcohol sales which prompts the cashier to request and enter the purchaser's date of birth before a sale can be completed.<sup>13</sup> To address shoplifting concerns, CVS sells no liquor in bottles smaller than 750 ml., and sells no beer in a quantity less than a 12-pack. Additionally, CVS has electronic devices placed at the entrance which do not allow for any item to leave the store, even if it has been paid for, without the clerk de-activating the inventory tag. Mr. Matty indicated that if the permit were granted, that CVS would

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<sup>10</sup> This HJ would note that CVS is the largest permit holder in Indiana.

<sup>11</sup> Periodically, law enforcement officers would work with minors in sending them into CVS and other retail establishments to see if any of the retailers checked would sell those products to them without asking for ID. CVS received a commendatory citation for having requested ID in 100% of the incidents where they were targeted.

<sup>12</sup> These are plastic reusable devices which CVS puts on the top of all bottled product before it is placed on the shelf for retail sale. It can only be removed by the cashier using a special tool. If a bottle is removed from the store other than through a retail transaction, the only way to remove the protective cap is to break the bottle, thus rendering the product unusable.

<sup>13</sup> This HJ understands this system as requiring the cashier to obtain the date of birth from every purchaser and actually enter that information, irrespective of the purchaser's actual age, in order for the sale to be completed.

have its employees at that location undergo the Indiana State Excise Police training program with respect to illegal sales of alcohol to minors. He said that in his experience with CVS to-date, that most store customers liked the fact that CVS sold alcohol and appreciated the convenience of being able to buy drug items as well as alcohol products at the same location and in the same transaction.<sup>14</sup> He also testified that he had done a price comparison regarding CVS alcohol prices to those charged by the package liquor stores in Portland, and indicated that, CVS prices would be lower, and in particular, beer would be an average of two dollars (\$2) per case less than the same brand purchased at a package liquor store. He also assured the LB that if the permit were granted, all CVS employees would be properly instructed on the sale of alcohol to members of the public. He noted that no drug stores have been permitted to sell alcohol in Jay County. However, in each CVS store which sells alcohol, people purchase it there and he feels there is no reason to assume that it would be any different here.

2. Jeffrey N. Scott, CVS district manager. None of his stores have had violations regarding sales to minors. None have had loitering problems. None of the stores advertise the sale of alcohol from outside. He feels it is important to offer a full line of products at each store. Many of CVS competitors sell beer, wine and liquor. He testified that he managed 20 CVS stores and that most sell alcohol.<sup>15</sup> He testified that it is company policy to terminate an employee, and possibly the store manager, if an improper sale of alcohol occurs.

B. The following witnesses testified before the ATC in opposition to the proposed permit being issued in this cause:

1. Ned Stuckey. Mr Stuckey summarized his testimony before the LB and introduced a petition containing some 600 individuals against the request in this case. He also introduced letters from the Jay County Sheriff, a leader of the Jay County High School “Just Say No” group and a local area minister opposing this request. He testified that the population of Jay County has decreased since 1970.<sup>16</sup> On cross examination he admitted that he had no evidence that CVS would sell alcohol in an irresponsible manner or in violation of the law. Moreover, he had no evidence that CVS had been a problem anywhere in Indiana. He personally opposes drug stores being able to sell alcohol. He acknowledged that persons who desire to purchase liquor in an environment other than a package liquor store have no option in Jay County.
2. Charles Finney, Associate Pastor, Portland First Church of the Nazarene. He does not feel that there is anyone who needs alcohol. It does not need to be more convenient to purchase, and if it is so, it will be easier for underaged persons to obtain it. He and his church parishioners do not understand why CVS needs to sell alcohol to be successful.

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<sup>14</sup> Mr. Matty referred to this as “one-stop” shopping, and indicated that demographic shopping studies done by CVS show that their customers want this type of shopping convenience.

<sup>15</sup> There are five (5) which do not sell alcohol. Of those, four (4) are restricted by location or zoning issues, irrespective of need or desire.

<sup>16</sup> Mr. Stuckey’s point is that Jay County does not need an additional liquor outlet in the face of a declining population.

3. Ruth Hosier, manager of the Northside Carryout and Southside Carryout, Portland.<sup>17</sup> Ms. Hosier reiterated her testimony before the LB, and particularly, focused on the fact that the Northside Carryout and Southside Carryout have been in business for more than 30 years and have well served the citizens of Jay County and that there is no need for an additional liquor outlet.
  4. Joseph T. Wallischeck, owner of Northside Carryout and Southside Carryout, Portland.<sup>18</sup> He testified that he remembered when drug stores sold alcohol in the 1940s, but that the situation is different today, and that the dangers of underaged drinking are more prevalent today with drinking and driving being more of a problem in this day and age because there are more cars and more minors on the road.
  5. John Livengood.<sup>19</sup> He felt that information from competitors was often the best information regarding need and desire for products as well as other issues regarding the impact of alcohol on life in the community.
- C. The following exhibits were offered and admitted into evidence in support of the proposed permit before the ATC:<sup>20</sup>
1. Permittee's Exhibit 1, consisting a petition containing the names of approximately 72 individuals who are customers of the Jay County CVS stating that they would like to see the Applicant sell liquor in the near future.<sup>21</sup>
  2. Permittee's Exhibit 2 (two parts) consisting of photographs of the electronic theft detection system in place at the entrance and exit to the proposed permit premises.
  3. Permittee's Exhibit 3, consisting of a table showing the quota and number of issued drugstore and grocery store permits in Portland, Jay County Indiana, per Commission records October 21, 2002.<sup>22</sup>
  4. Permittee's Exhibit 4, consisting of a listing of all alcoholic beverage permits in Jay County.<sup>23</sup>
  5. Permittee's Exhibit 5, consisting of a two-page Geographic Comparison Table from the United States Census Bureau showing the population of each county in Indiana.<sup>24</sup>

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<sup>17</sup> Ms. Hosier testified following the conclusion of the official record of proceedings before the Commission. However, given the conflict between *Wine and Spirits* and *IABR*, Her testimony, though taken as an appendix to these proceedings in the event that the Indiana Supreme Court determines that competitors have standing to object to the issuance of competing permits, will, nonetheless be considered. However, given that she is a competitor of CVS, it is not compelling. *See*, fn. 9, *supra*.

<sup>18</sup> *Id.*

<sup>19</sup> Mr. Livengood is the Executive Director of the Indiana Association of Beverage Retailers, which suffers from the same standing issues as other competitive remonstrators. *See*, fn. 9, *supra*. While his concerns may be a reason for changing the law, they do not go to the issues presented in this case.

<sup>20</sup> Applicant purposefully left open Exhibit 1 and referred to the petition which had been entered before the LB. Because this HJ is taking judicial and administrative notice of the proceedings before the LB, it is not necessary to reintroduce this exhibit. Thus, there is no "Exhibit 1".

<sup>21</sup> The overwhelming majority of these customers are Portland residents.

<sup>22</sup> This exhibit shows that pursuant to IC 7.1-3-22-4, there are four (4) grocery store permits and four (4) drug store permits authorized for issuance in Jay County, none of the drug store permits of which have been issued by the LB.

<sup>23</sup> This HJ would note that no Type 208 pharmacy permits have been issued in Jay County.

<sup>24</sup> Jay County's population is 21,806.

6. Permittee's Exhibit 6, consisting of a table showing the drug store, grocery store and package store permits issued in Indiana counties of similar size to Scott County.<sup>25</sup>
7. Permittee's Exhibit 7, consisting of a map of Indiana annotated with the number of dealer permits issued in Indiana counties of similar size to Scott County.
8. Permittee's Exhibit 8, consisting of a table showing package store and CVS' prices for certain alcoholic beverages and alleged consumer savings.<sup>26</sup>
9. Permittee's Exhibit 9, consisting of Findings of Fact and Conclusions of Law of the Commission dated June 4, 1996 in the matter of four applications by Hook-SupeRx, Inc. for type 208 permits in Kokomo, Indiana.<sup>27</sup>
10. Permittee's Exhibit 10, consisting of Findings of Fact and Conclusions of Law of the Commission dated December 24, 1997 in the matter of Hook-SupeRx, Inc.'s application for a type 208 permit in Spencer, Indiana.
11. Permittee's Exhibit 11, consisting of Findings of Fact and Conclusions of Law of the Commission dated February 4, 2003 in the matter of Thornton Oil Corporation's application for a Type 115 permit in Marion County.
12. Permittee's Exhibit 12, consisting of a twenty-three-page report of the Office of Fiscal Review, Indiana Legislative Services Agency concerning Sunset Audits on the Alcoholic Beverage Commission dated May 1987.
13. Permittee's Exhibit 13, article from indystar.com (The Indianapolis Star), April 14, 2004, regarding the annual Dyngus Day festival in South Bend.<sup>28</sup>
14. Permittee's Exhibit 14 listing the name and age of each of the Portland CVS employees.<sup>29</sup>

D. The following exhibits were introduced before the ATC in opposition to the proposed permit being granted in this matter:

1. Remonstrators' Exhibit A, consisting of approximately 600 signatures in opposition to the issuance of a liquor license to Applicant in the instant case.

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<sup>25</sup> Of the twenty-two (22) counties listed, five (5) of them have less population than Jay County and sixteen (16) have a greater population than Scott County. They range from a population low of 19,306 (Orange) to a high of 31,705 (Jefferson). Jay County is one of only five (5) counties which has issued no drugstore permits.

<sup>26</sup> Although this information shows that CVS would be able to offer Jay County consumers savings on alcohol purchases over what they would otherwise pay for the same product at a package liquor store, its value to show need or desire is dubious because there is no evidence that the product is otherwise unobtainable or that the price charged by package liquor stores has affected the amount of product purchased.

<sup>27</sup> This exhibit was offered to show that the Commission will reverse a LB recommendation when that recommendation is contrary to law, and in that matter particularly, that the Howard County LB refused to issue any grocery or pharmacy permits, regardless of the prospective permittee's qualifications.

<sup>28</sup> This exhibit was offered to show that consumption of alcohol is embraced by mainstream America and that politicians enjoy a drink from time to time as part of this culture.

<sup>29</sup> The average age of the Portland CVS employee is around 50 years old. The store has 24 employees, only two of which are under the age of 21, specifically 19 and 18, respectively.

2. Remonstrators' Exhibit B, letter from Jay County Sheriff Todd Penrod objecting to the application for the permit in this case along with a table showing the number of persons incarcerated for alcohol offenses in Jay County from November, 2001 through approximately May, 2004.<sup>30</sup>
3. Remonstrators' Exhibit C, consisting of a letter from Judith Smith, Portland, leader of Jay County East Elementary School "Just Say No" program opposing the request in this cause.
4. Remonstrators' Exhibit D, consisting of a letter from the Rev. Paul A. Strouse, West Walnut Church of Christ, Portland, opposing the request in this cause.<sup>31</sup>
5. Remonstrators' Exhibit E, population statistics for Jay County since 1970.
6. Remonstrators' Exhibit F, letter from Linwood Doane, Jay County Drug Abuse Prevention Coalition to the Governor's Commission for a Drug-Free Indiana, dated November 12, 2003, along with the attached 2004 Jay County Local Comprehensive Plan Update.<sup>32</sup>
7. Remonstrators' Exhibit G. Internet site cover page for YouthVoice.net, followed by 6 pages of summaries of official positions taken by organizations in Indiana which advocate for youth health issues.<sup>33</sup>
8. Remonstrator's Exhibit H, map showing the CVS with respect to the surrounding neighborhood.<sup>34</sup>

#### IV.

#### FINDINGS OF FACT.

1. The prospective permittee, Hooks-SuperRx, Inc., d/b/a CVS Pharmacy, 802 North Meridian Street, Portland, Indiana 47371, ("prospective permittee" or "permittee") is the applicant for

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<sup>30</sup> The remonstrators introduced no evidence to show that awarding a permit to CVS would materially change these numbers for the worse.

<sup>31</sup> Rev. Strause's letter takes issue with CVS's mission statement regarding helping people live longer, healthier lives v.s.v. the sale of alcohol. He also suggests that CVS is being insensitive to the desire of the community with respect to the number of people against this proposal. He is concerned about Mexican Americans being able to read English warning labels regarding the dangers of taking certain prescription drugs and alcohol. He does not believe that CVS can prevent the sale of alcohol to minors and cites inadequate staffing concerns. Finally, he is concerned that CVS may be able to put the two existing package liquor stores in Portland out of business by selling alcohol at prices that they cannot match.

<sup>32</sup> A review of the Update does not indicate any problem with CVS's request, even though it was filed and made public one month before this letter and accompanying plan were issued. *See*, last two pages of the report, Problem 4. This HJ takes note that none of the recommendations included limiting the available outlets for the purchase of alcoholic beverages.

<sup>33</sup> These organizations include the Indiana Coalition to Reduce Underaged Drinking (ICRUD), Indiana Youth Commission, Indiana Point of Youth, Orange Ribbon Campaign, and Youth As Resources (YAR). Contained in the attached pages is information regarding these organizations' positions on aspects of youths and alcohol, *i.e.*, ICRUD's advocating for the keg registration labels and for server training to help deter underaged drinking. Again, this HJ takes note that none of the recommendations included limiting the available outlets for the purchase of alcoholic beverages.

<sup>34</sup> This exhibit shows conclusively that CVS is located in a commercial district.



an Indiana Alcohol & Tobacco Commission (“ATC”) for a type 208 permit, #DL38-20719. (ATC File).

2. Permittee meets the qualifications to hold a permit pursuant to IC 7.1-3-4-2, IC 7.1-3-5-2, IC 7.1-3-10-2 and IC 7.1-3-15-2. (LB Hearing; ATC Hearing).
3. The permittee is of good moral character and of good repute in the community as required by 905 IAC 1-27-1. (LB Hearing; ATC Hearing).
4. CVS is Indiana’s largest holder of ATC permits with approximately 228 out of 248 stores holding such permits. (ATC Hearing).
5. The prospective permittee operates a store in a commercial or business district, which does not currently sell any alcohol regulated by the ATC. (LB Hearing; ATC Hearing).
6. The prospective permittee desires to obtain a pharmacy permit which would entitle it to sell beer, wine and liquor. (LB Hearing; ATC Hearing).
7. That the proposed premises of the Applicant is not in a residential area as defined by IC 7.1-3-19-13 or 905 IAC 1-18-1. (Commission hearing).
8. There exists on the quota for Portland, Jay County, Indiana an opening for a type 208 dealer (pharmacy) permit. (ATC Records).
9. The quota system for pharmacy permits shows that based on the population of Jay County, that four (4) are authorized. (ATC Hearing; ATC Records).
10. The Jay County LB has never issued any pharmacy permits. (ATC Hearing; ATC Records).
11. Jay County is one of five comparably sized counties by population that has not issued any pharmacy permits. (ATC Hearing; ATC Records).
12. There are only two (2) outlets in Jay County where one can purchase liquor regulated by the Commission, and both outlets are package liquor stores, owned by Joseph T. Wallischeck. (ATC Hearing; ATC Records).
13. CVS has a computer system whereby in order to ring up a sale of an alcoholic beverage, a clerk has to enter the purchaser’s date of birth, regardless of whether the person appears to be older than 21 years of age; CVS places a security cap on all alcohol products it sells, and the cap can only be removed by the sales clerk at the time of sale, and otherwise, the only way to open the bottle is to break it; CVS does not allow individuals under the age of 21 years to sell alcohol; and CVS deals aggressively with illegal sales to minors, with automatic termination of the sales clerk involved on the first offense, and possible termination of the store manager as well. (ATC Hearing).
14. Persons who desire to purchase liquor at a location other than a package liquor store have no options in Jay County. (LB Hearing; ATC Hearing).
15. Joseph T. Wallischeck has a monopoly on the sale of liquor in Portland and Jay County. (LB Hearing; ATC Hearing; ATC Records).<sup>35</sup>

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<sup>35</sup> Mr. Wallischeck is the owner of the Northside Carryout, 1226 North Meridian Street, Portland, Permit No. DL38-10163; and the Southside Carryout, 501 South Meridian Street, Portland, Permit No. DL38-04426. Given that Portland is one (1) over quota with respect to Type 217 permits, and given Jay County’s declining population, it is unlikely that there will be an opening for an additional package liquor store at anytime in the near future. Thus, in

16. A portion of the remonstrance was competitive based, particularly, the economic protection of Portland's two package liquor stores. (LB Hearing).
17. Where a monopoly exists with respect to a given commodity, in this case, liquor, it results in an unhealthy economic market where consumers have fewer choices and are subject to the whims of the seller. (ATC Hearing).
18. Granting a permit to CVS in this matter would ensure additional choices for individuals as to where they purchase liquor and would result in a greater convenience for CVS customers.
19. At the LB hearing on this Application on October 23, 2002, approximately thirty-four (34) persons appeared to remonstrate against the issuance of this permit. (LB Hearing).
20. CVS presented evidence of a need or desire for services at that location in the form of a petition signed by its customers stating that they would like to purchase alcohol from CVS at that store. (LB Hearing).
21. The LB voted 3-1 to recommend disapproval of the Applicant's application for a type 208 permit, citing no need or desire for the community to receive the services at that location, but also indicating that the LB had never issued a pharmacy permit and that they feared other similar stores asking for the same privilege.<sup>36</sup> (LB Hearing).
22. The current Jay County LB as a whole, appears to have a policy of not issuing pharmacy permits to qualified applicants without regard to the location.<sup>37</sup>
23. The ATC upheld the recommendation and voted to deny the application. (ATC File).
24. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

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the absence of a pharmacy permit in the county, Mr. Wallischeck's hold on the sale of package liquor in Jay County would be secure.

<sup>36</sup> Having a uniform policy against issuing pharmacy or grocery permits is an impermissible reason for not granting such requests. The Indiana General Assembly has codified the process for enacting "home rule" ordinances which allow municipalities to enact local laws and ordinances to regulate conduct. *See*, IC 36-1-3-1, *et.seq.* The "Home Rule" Act specifically prohibits municipalities from exercising "home rule" to "regulate conduct that is regulated by a state agency, except as expressly granted by statute." IC 36-1-3-8. The ATC is specifically empowered and authorized to regulate the issuance of alcoholic beverage permits. *See*, IC 7.1-1-1, IC 7.1-1-3-1, and IC 7.1-2-3-9. Thus, home rule by Jay County, or any other county with respect to alcoholic beverages is forbidden. Moreover, Indiana law charges the ATC with ensuring that ATC laws and regulations are enforced uniformly throughout Indiana. *See, Indiana Alcoholic Beverage Commission v. Osco Drug*, (1982) Ind.App., 431 N.E.2d 823, 830. The General Assembly has authorized the issuance of pharmacy and grocery permits, but allowing them in some counties and not others as a policy matter solely, is forbidden.

<sup>37</sup> One LB member who lives outside of Portland lamented that if CVS got one, the drug store where he lives would have one too. Another LB member acknowledged that several decades ago, there were approximately 4 drug stores in Portland, 3 of which sold alcohol but it was not openly displayed as it is today and for that reason he felt it was improper.

V.

CONCLUSIONS OF LAW.

1. The prospective permittee, Hooks-SupeRx, Inc., d/b/a CVS Pharmacy, 802 North Meridian Street, Portland, Indiana 47371, (“prospective permittee”) is the applicant for an Indiana Alcohol & Tobacco Commission (“ATC”) for a type 208 permit, #DL38-20719. (ATC File).
2. The prospective permittee is not disqualified from holding an Indiana Alcoholic & Tobacco Commission permit. IC 7.1-3-4-2, IC 7.1-3-5-2, IC 7.1-3-10-2 and IC 7.1-3-15-2.
3. The prospective permittee is of good moral character and is of good repute in the community. 905 IAC 1-27-1.
4. That the proposed permit premises are not in a residential area. IC 7.1-3-19-13 or 905 IAC 1-18-1.
5. There exists on the ATC's quota for Portland, Jay County, Indiana, an opening for a pharmacy permit. IC 7.1-3-22-4.
6. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.
7. The evidence presented by the permittee, including, but not limited to, the petitions signed by CVS customers regarding their desire to purchase liquor at CVS as well as the fact that there is a monopoly in Jay County with respect to the sale of liquor and that persons who desire to purchase liquor in Jay County have no alternative but to purchase it at one of two package liquor stores owned by the same individual is persuasive and substantial evidence that there are persons in Portland and Jay County who need or desire the ability to purchase liquor at a pharmacy and in a setting other than a package liquor store. *Id.*
8. Because the current Jay County LB appears to have a practice of issuing no pharmacy permits while granting package liquor store and other retail permits, given the evidence before the Commission, the recommendation of the LB is:
  - (1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
  - (2) Contrary to a constitutional right, power, privilege or immunity;
  - (3) In excess of, or contrary to, statutory jurisdiction, authority, limitations or rights;
  - (4) Without observation of procedure required by law; or
  - (5) Unsupported by substantial evidence. IC 7.1-3-19-11.
9. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the decision of the LB to recommend the denial of issuance of a permit to Hooks-SupeRx, Inc., d/b/a CVS

Pharmacy, 802 North Meridian Street, Portland, Indiana 47371, permit application #DL38-20719, is hereby reversed and issuance of a type 208 permit to the prospective permittee is hereby granted.

DATED: \_\_\_\_\_

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MARK C. WEBB, HEARING JUDGE